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IN THE

Supreme Court of the United States

NO. 743 OCTOBER TERM, 1962

NICHOLAS A. STIRONE, Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING AND, IN THE ALTERNATIVE, MOTION TO REMAND

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully prays for a rehearing of the Order of Court dated March 4, 1963, denying his Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and, in the alternative, moves to remand and for the discharge of the Petitioner.

BASIC FACTS

Petitioner was indicted on March 20, 1956, on a charge of violating the Hobbs Anti-Racketeering Act, 18 U.S.C.A. 1951. During jury trial the indictment was amended by the trial judge. The amendment took place after the indicting grand jury had been discharged. Petitioner was found guilty, and on December 12, 1957, was sentenced to be imprisoned for a period of three years and directed to pay a fine of $5,000.00. Appeal was duly taken from the judgment of conviction and the Court of Appeals for the Third Circuit affirmed the conviction in a 2-1 Opinion, 262 F.2d 571. On petition for

rehearing, this conviction was affirmed by a 5-2 decision. Certiorari was granted by this Court, and after argument, your Honorable Court unanimously reversed the judgment of the Court of Appeals for the Third Circuit in *Stirone v. U. S.*, 361 U.S. 212, 80 S. Ct. 270 (1960). The reversal was for the reason that the indictment for an infamous crime had been amended by the trial judge. The cause was remanded by this Court to the District Court for proceedings in conformity with the opinion of this Court. Subsequent thereto and before trial, Petitioner moved for his discharge on the basis of the void indictment and double jeopardy. Both motions were denied.

Petitioner, on October 2, 1961, was called again to answer the original indictment, and after trial, was found guilty by a jury, and on October 6, 1961, was sentenced to the custody of the Attorney General for a period of ten years and directed to pay a fine of $10,000.00 with costs of prosecution. Appeal was taken to the Court of Appeals for the Third Circuit which affirmed the conviction on November 26, 1962, 311 F.2d 277. Petition for Certiorari was timely filed with this Court and denied on March 4, 1963.

Petitioner advances the following reasons for granting this petition:

1. The Court of Appeals for the Third Circuit in *U. S. v. Stirone*, 311 F.2d 277, has decided a Federal question in a way in conflict with the applicable decisions of this Court. The Third Circuit decided that when an indictment in a felony case is amended by the Trial Judge that the defendant after such amendment can be tried on the original indictment without the necessity of resubmission to a grand jury as required by the Fifth

Amendment. This decision specifically conflicts with this Court's decisions in *Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, and *Russell v. U. S.*, 369 U. S. 749, 82 S. Ct. 1038. An important constitutional question is involved, the Petitioner's present conviction resting on a void indictment in a felony case. This Court specifically found in reversing the original conviction that the trial judge committed fatal error in amending the grand jury's indictment, and this Court did not, in its Opinion or judgment, order that the Petitioner be retried. There was no new indictment by a grand jury, and the Petitioner was, over his objections, retried on the original amended indictment.

The lower court on the second trial was without jurisdiction to try Petitioner on an invalid indictment because the court in claiming jurisdiction could do so only on one of two theories. First, that in addition to the void amended indictment of the grand jury, there was in the records of the District Court a valid grand jury indictment for the infamous crime of extortion under the Hobbs Act or that the court below had power to make a valid indictment out of one declared by this Court to be void when it reversed the judgment of conviction.

There is no doubt that the amended or changed indictment, upon which this Court reversed, was the only indictment left in the case and that the changed or amended indictment was no indictment at all. *Ex parte Bain*, supra, says that when an indictment is amended, it is destroyed and void, and the lower court has no power or jurisdiction to try the prisoner. The District Court tried the prisoner on the same indictment that had been found fatally defective. No new indictment of a grand jury was had.

2. The Petitioner being forced to trial the second time after the original felony indictment had been amended was placed in double jeopardy in violation of the Fifth Amendment of the Constitution.

3. The trial judge, after the second trial sentenced the prisoner to 10 years imprisonment and a fine of $10,000.00 with costs when the judgment of conviction at the first trial was 3 years imprisonment and $5,000.00 fine with costs, and this was a cruel and unusual punishment in violation of the Eighth Amendment.

AND for the foregoing reasons, Petitioner respectfully prays that the Order of this Court denying Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit be reheard and vacated and that the petition be granted, or, in the alternative, that your Honorable Court under its supervisory power review and remand said cause to the District Court of the United States for the Western District of Pennsylvania with directions to dismiss the void indictment and to discharge the Petitioner.

VINCENT M. CASEY
B. NATHANIEL RICHTER
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the Petition for Rehearing filed in this cause is presented in good faith; that in my judgment said Petition is restricted to the grounds specified in Paragraph 2 of Rule 58; and is not interposed for delay.

VINCENT M. CASEY
Counsel for Petitioner